Supreme Court, U.S.
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No. 99-___

In The

Supreme Court of the United States

WAYNE ANTHONY ROSS, REPUBLICAN PARTY OF ALASKA, INC., ALASKA LIBERTARIAN PARTY, ALASKAN INDEPENDENCE PARTY, MARK CHRYSON AND LINDA S. McKAY,

Petitioners,

v.

STATE OF ALASKA, STATE OF ALASKA DIVISION OF ELECTIONS, LIEUTENANT GOVERNOR FRAN ULMER, IN HER OFFICIAL CAPACITY OF SUPERVISOR OF ELECTIONS, AND SANDRA J. STOUT, IN HER OFFICIAL CAPACITY OF DIRECTOR OF THE DIVISION OF ELECTIONS,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Alaska Election Code provides for a single "blanket" primary election in which any voter has the right to vote for any candidate, regardless of the party affiliation of the voter or the candidate. The Rules of the Republican Party of Alaska (RPA) provide that only registered Republicans, registered independents, and registered voters who state no preference of party affiliation may vote in the Alaska Republican primary election. The Alaskan Independence Party (AIP) and the Alaska Libertarian Party (ALP) provide them the right to opt out of the primary election entirely.

The questions presented are:

(1) Whether the election law of Alaska conflicts with prior free political association decisions of this Court such as *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986); and *Democratic Party of the United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107 (1981).

(2) Whether it is a violation of the First Amendment right of free political association for the State of Alaska to require (a) the Republican Party to participate in a blanket primary election, in which registered Democrats and members of other political parties may vote on Republican nominees, and (b) the Alaskan Independence Party and the Alaska Libertarian Party to participate in the primary election at all, as a condition of placing the party candidates on the Alaska general election ballot.

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PETITION FOR WRIT OF CERTIORARI

Wayne Anthony Ross, the Republican Party of Alaska, Inc. (RPA), the Alaska Libertarian Party (ALP), the Alaskan Independence Party (AIP), Mark Chryson, and Linda S. McKay respectfully petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit.[1]

OPINION BELOW

The final opinion of the United States Court of Appeals for the Ninth Circuit is *Ross v. State of Alaska*, ___

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[1] The core question involved in this petition for certiorari is the definition of the First Amendment rights of Alaskan political parties. Notwithstanding the fact that the opinion technically deals with res judicata and standing, this Court has the authority to review the core question to provide much needed principles and guidance for future proceedings, regardless of the decision of the Court of Appeals on res judicata and standing.

The decision of the Court of Appeals was erroneous on res judicata and standing, particularly with respect to the Alaskan Independence Party. The AIP ran candidates in 1998, its bylaws clearly conflicted with the Alaska election law, and it got stuck with a candidate that it did not want or support. Preclearance of its bylaw was not necessary, because the United States Department of Justice made it clear to the Republican Party that it would not preclear election rule changes which conflicted with statute until the conflict was judicially resolved.

In fact, all the Alaskan political parties have true controversies with the State of Alaska over the Alaska election laws, and will be litigating again in the future. The Alaska Libertarian Party is now ballot-qualified and will be running candidates in 2000. Problems and litigation will continue.

There is no public interest in delaying review of the core question at this point.

F.3d ___, 1999 WL 680345 (Ninth Circuit Docket No. 98-35720, decided September 2, 1999) App. 1.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit issued its original opinion on September 2, 1999. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The United States Constitution, First Amendment:

> *Freedom of religion, of speech, and of the press.* Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

A.S. 15.25.010:

> *Provision for Primary Election.* Candidates for the elective state executive and state and national legislative offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter.

A.S. 15.25.030 provides that a person places his or her own name on the primary election ballot by filing a declaration of candidacy, with no input or control by the affected political party. The primary election is a "blanket" primary election, in which a voter has the right to vote for any candidate, regardless of the party affiliation of the voter or the candidate. *See O'Callaghan v. State of*

Alaska, 914 P.2d 1250 (Alaska 1996), cert.den., 920 U.S. 1207 (1997).[2]

STATEMENT OF THE CASE

A. Presentation of Federal Question

The constitutional right of Wayne Anthony Ross and the RPA and its members to free political association was presented to the District Court in the initial complaint filed February 16, 1995. The same rights of the remaining petitioners were presented to the District Court in the third amended complaint filed July 31, 1997. These rights were also presented to the Court of Appeals for the Ninth Circuit in the briefing on the appeal.

B. Statement of Facts and Proceedings

A.S. 15.25.010 provides for a single blanket primary election in the State of Alaska, in which any voter has the right to vote for any candidate for each public office listed on the ballot, regardless of the party affiliation of the voter or the candidate. In the blanket primary, the candidates of each political party are selected to appear on the general election ballot for the offices of governor, lieutenant governor, members of the Alaska State Senate and State House of Representatives, and Alaska representatives to the United States Senate and House of Representatives. The Alaska blanket primary statute conflicts

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[2] The denial of the petition for certiorari in *O'Callahan* is discussed in detail in the Brief Amicus Curiae in Support of Petitioners in *California Democratic Party v. Jones*, Docket No. 99-401 at pages 4-6. In summary, the issues presented in *O'Callaghan* and the case at bench were not ripe for review at that time because pending litigation needed to be completed and a judicial record developed.

with Article XIV, Section 1, of the Republican Party Rules;[3] with Bylaw 5.15 of the Alaskan Independence Party;[4] and with a current interim amendment to the Bylaws of the Alaska Libertarian Party.[5] The conflict between the RPA rules and the Alaska statute deals with who may vote in the Republican primary election. The other two parties want to be able to select their candidates without going through the primary election at all.

The RPA adopted Article XIV, Section 1, of its rules on March 31, 1990. The RPA requested the State of Alaska to implement its rule for the 1990 primary election. The

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[3] Article XIV, Section 1, provides: Only registered Republicans, registered Independents, and those who state no preference of any party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature.

[4] Bylaw 5.15 provides: In any election for public office where the Alaskan Independence Party is authorized by law to nominate a candidate, the State Committee shall be empowered to present a nominee in the name of the Alaskan Independence Party, or to reject any candidate not an Alaskan. (This rule as published contains a typographical error. The AIP State Committee's authority to reject candidates is broader than to reject simply based on Alaskan residency.)

[5] The bylaw provides: The Alaska Libertarian Party may select or endorse its candidates for elected political office in one of the manners outlined in this section, and in no other way. Only individuals who have been duly selected by the ALP to run as Libertarian candidates for elected political office may run in an election under the party name "Libertarian." . . .

A candidate may be selected in a regular or special state party convention by a majority of the paid-up Alaska LP members in attendance.

A candidate may be selected outside of state convention by a majority of the Alaska LP executive committee.

State of Alaska refused to do so. The RPA then filed an action in the United States District Court for the District of Alaska to require that its party rule be implemented for the 1990 Republican primary election. *Doyle v. State*, F90.33 CV (D. Alaska 1990). The District Court declined to do so, however, because United States Justice Department preclearance of the RPA rule had not been obtained in sufficient time to implement the rule in 1990.

After Justice Department preclearance had been obtained, the RPA requested the State to implement its rule for the 1992 Republican primary election. The State again refused to do so. The RPA filed a second action in the District Court, *Zawacki v. State*, A92-414 CV (D. Alaska 1992). In *Zawacki*, the Honorable James K. Singleton announced a tentative decision that, under *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), the Alaska blanket primary statute infringed on the RPA's right to free political association and that the Lieutenant Governor had the authority pursuant to *Tashjian* to implement regulations contrary to statute to protect the RPA's right to free political association. Based on Judge Singleton's tentative decision, the parties in *Zawacki* were able to stipulate that the 1992 Republican primary election would be conducted in accord with the RPA rule. The State adopted temporary regulations for the 1992 primary election, and permanent regulations for the 1994 primary election. The 1992 and 1994 primary elections were conducted pursuant to the RPA rule and these regulations.[6]

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[6] The State has always refused to implement Article XIV, Sections 2, 3, and 5 of the RPA rules, which deal with the use of the Republican name, maximizing voter participation in primary elections, and requiring six months prior party

In *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996), by a three to one decision, the Supreme Court of Alaska held that Alaska's blanket primary statute is constitutional, and that any interference between Alaska's blanket primary statute and the RPA's rights of free political association is minor and justified by the State's interests.[7] In reaching this decision, the majority opinion placed the burden of proof on the RPA to show a substantial burden to its associational rights. *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980). However, notwithstanding the fact that the majority placed the burden of proof on the RPA, the majority did not afford the RPA any opportunity to make a factual record before the trial court.[8]

Justice Jay A. Rabinowitz, in a correct and well-reasoned dissent, would have placed the burden on the State of Alaska to demonstrate compelling reasons for limiting the associational rights of the RPA. As the State had failed to demonstrate any such compelling reasons, Justice Rabinowitz concluded that the Alaska blanket primary statute is unconstitutional under the First and Fourteenth Amendments to the United States Constitution.

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registration. Section 5, which places a six month prior party registration requirement on candidates, is now particularly important. As the Supreme Court of Alaska has prevented the RPA from determining voter qualifications for participation in the Republican primary, it becomes much more important that the RPA at least have some input into who are designated as its candidates.

[7] The Supreme Court of Alaska made certain rulings in the *O'Callaghan* case which provided the basis for the res judicata issues in the case at bench.

[8] The RPA pointed out to the Supreme Court of Alaska that it was necessary for a remand to develop factual issues if the Court was going to abrogate the RPA's right to free political association. *O'Callaghan*, n.16.

The RPA petitioned this Court for certiorari, seeking a review and overruling of the *O'Callaghan* decision. This petition was denied.

The RPA did not participate as a party before the trial court in the *O'Callaghan* case. After briefing and oral argument on appeal, the Supreme Court of Alaska invited certain organizations, including the RPA, to participate as parties or amicus curiae. *O'Callaghan v. Coghill*, 888 P.2d 1302, 1305-1306 (Alaska 1995). These additional participants were allowed to file supplementary briefs limited to addressing the constitutionality of Alaska's blanket primary statute, and were prohibited from addressing any other issues in the case.[9]

On February 17, 1995, the RPA filed a motion to intervene, accompanied by a complaint in intervention. The Supreme Court of Alaska allowed the RPA to intervene on February 27, 1995.[10] Prior to filing the motion to intervene in the Supreme Court of Alaska, the RPA filed its initial complaint in the United States District Court in the case at bench.

Originally, the State of Alaska supported the position of the RPA. However, on March 6, 1995, in a memorandum filed with the Supreme Court of Alaska, the State changed its position to support the plaintiffs and

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[9] Since the RPA did not participate in these proceedings in the trial court, it was not able to make any factual record. The RPA's presentation of its case was limited to briefing only a single issue before the Supreme Court of Alaska.

[10] The Alaskan Voters for an Open Primary also participated as an intervenor. The Alaskan Independence Party and the Alaska Federation of Natives participated as amici curiae.

defended the constitutionality of the Alaska blanket primary statutes.[11]

Once the State of Alaska changed its position, the RPA was the only party defending the RPA rule and State regulations. On March 9, 1995, the RPA timely removed this case to the United States District Court as *O'Callaghan v. Coghill*, Case No. A95-0087 CV (HRH). The State of Alaska, the Alaskan Voters For An Open Primary, and Mike O'Callaghan filed motions to remand. The District Court remanded this case to the Supreme Court of Alaska on June 29, 1995.[12]

The RPA petitioned this Court for a writ of certiorari to review the *O'Callaghan* decision. This petition was denied. After the petition was denied, the case at bench proceeded in the United States District Court. On July 31, 1997, a third amended complaint added the Alaska Libertarian Party, the Alaskan Independence Party, John B. Coghill and Linda S. McKay as new parties to the case. Mark Chryson was subsequently substituted for Mr. Coghill as Chairman of the Alaskan Independence Party.

The State of Alaska filed two motions which limited the issues before the District Court. The first motion was

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[11] In effect, by changing its position, the State of Alaska unilaterally repudiated its agreement with the RPA pursuant to which the 1992 federal litigation was resolved, and the Republican primary election implemented. The governor of Alaska in 1992 was a member of the Alaskan Independence Party. The governor at the time of the 1995 repudiation was a Democrat. The First Amendment right of the RPA to free political association fell victim to the politics of the moment.

[12] The RPA believed that the remand order was incorrect as a matter of law, but had no remedy. The remand order was not reviewable on appeal or otherwise. 28 U.S.C. § 1447(d).

for partial summary judgment on res judicata. The District Court ruled that "claim preclusion" is not a bar, but that "issue preclusion" prevents the Republican Party of Alaska, Inc., Wayne Ross and Linda McKay from relitigating issues decided in *O'Callaghan*. This ruling also held that neither "claim preclusion" or "issue preclusion" applied to the Alaskan Independence Party, Mark Chryson, or the Alaska Libertarian Party.

The State of Alaska then filed a motion to dismiss the claims by the Alaskan Independence Party, Mark Chryson, and the Alaska Libertarian Party for lack of case or controversy. The District Court granted this motion.

At this point, with only limited claims of the Republican Party of Alaska, Wayne Rose and Linda McKay surviving; with the Alaskan Independence Party, Mark Chryson and the Alaska Libertarian Party being dismissed from the case; and with the elections approaching, it appeared appropriate to dismiss the case without prejudice. The case was dismissed without prejudice by the District Court. The dismissal preserved the right to appeal those issues decided by the District Court.

This dismissal was appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the dismissal in *Ross v. State of Alaska*, ___ F.3d ___, 1999 WL 680345 (Ninth Circuit Docket No. 98-35720, decided September 2, 1999) App. 1.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS FOR THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND A PRIOR DECISION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, AND IS INCORRECT AS A MATTER OF FEDERAL CONSTITUTIONAL LAW.

Freedom of association is among the preferred rights derived from the First Amendment guarantees of speech, press, petition and assembly. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976). It is beyond debate that freedom of association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the due process clause of the Fourteenth Amendment. *NAACP v. Alabama, ex rel. Patterson*, 357 U.S. 449, 460 (1958).

The Alaska blanket primary statute interferes with the right of the all Alaskan political parties to free political association by preventing them from using their chosen methods of selecting candidates to represent the parties on the general election ballot. Specifically, the Alaska statute requires the parties to participate in a primary election system in which members of political parties may vote to choose candidates of other political parties, when the parties themselves desire a different manner of selection – the RPA desiring to limit the participants in the RPA primary to exclude voters of other political parties, and the Alaskan Independence Party and the Alaska Libertarian Party desiring to nominate by committee or convention.

This Court has made it absolutely clear that a court must apply strict scrutiny in determining the constitutionality of Alaska's blanket primary statute. *Burdick v. Takushi*, 504 U.S. 428 (1992), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989), *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107 (1981). If a challenged law burdens the right of free political association of a political party and its members, the law can survive constitutional scrutiny only if the state shows that the law advances a compelling state interest and is narrowly tailored to serve that interest. *Burdick v. Takushi*, 504 U.S. 428 (1992), *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

This Court has repeatedly held that one of the basic rights of free political association is the right to nominate candidates of the party's choice. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) involved the selection of Republican candidates to run in the general election. The State of Connecticut wanted to keep the candidate selection process closed, while the party wanted to allow certain non-party members to vote. *Democratic Party of the United States v. Wisconsin, ex rel. LaFollette*, 450 U.S. 107 (1981) involved the delegate selection process of a national party for national conventions. The State of Wisconsin wanted to keep the delegate selection process open, while the party wanted to close the process to outsiders. In both *Tashjian* and *LaFollette*, this Court held that the parties' desires prevailed over the states' interest in opening or closing the candidate or delegate selection process. In *LaFollette*, 450 U.S. at 124, n.27, this Court specifically stated:

> It is for the National Party – and not for the Wisconsin Legislature or any court – to determine the appropriate standards for participation in the party's candidate selection process.

Most recently, in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), this Court reaffirmed *Tashjian*, stressing that "[t]he New Party's claim that it has a right to select its own candidate is uncontroversial, so far as it goes . . . That is, the New Party, and not someone else, has the right to select the New Party's 'standard bearer.' "

In distinguishing *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986) from prior cases in which this Court has considered claims by non-members of a party seeking to vote in that party's primary despite the party's opposition, the *Tashjian* majority stated that in the class of cases where there is an element of potential interference with the rights of party members, the non-members' desire to participate in the party's affairs is overborne by the countervailing and legitimate right of the party to determine its own membership qualifications. *Tashjian*, 479 U.S. at 215, n.6, *citing Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Nader v. Schaffer*, 417 F.Supp. 837 (D. Conn.), *summarily aff'd*, 429 U.S. 989 (1976). This principle applies equally to *Tashjian* and the case at bench. With respect to the RPA, in both *Tashjian* and the case at bench, the qualified voters can generally be classified as Republican Party members and independent voters. Under both the Connecticut and Alaska rules, only political opponents are excluded from participating in the respective primary elections. With respect to the other two Alaskan political parties, the harm is even greater because they want the right to exclude themselves from the primary election process entirely.

Concerns raised in the dissenting opinions in *Tashjian* are not applicable to the case at bench. The dissenting

opinion of Justice Stevens, joined by Justice Scalia, deals with the voter qualifications clauses of the United States Constitution. This concern is not present in the case at bench. Alaska has a statewide voter registration system, and every person who is qualified to vote in a federal election for a member of the House of Representatives or for a United States Senator is also qualified to vote for candidates to the Alaska House of Representatives.

The dissenting opinion of Justice Scalia, joined by Chief Justice Rehnquist and Justice O'Connor, questioned the extension of the concept of free political association to the casual contact of an independent voter casting a vote in the Republican Party primary election. The right of free political association is very clearly applicable, however, where the State requires the RPA to accept registered political opponents as voters in its primary election. Justice Scalia also questioned the propriety of a process that permits the members' votes to be diluted by the votes of outsiders. By excluding the votes of Democrats and members of other political parties, the RPA corrected a more serious dilution of its members' votes that had existed in the past.

The majority opinion in *O'Callaghan* conflicts with the previously cited decisions of this Court.[13] The majority relied on *Heavey v. Chapman*, 611 P.2d 1256 (Wash. 1980). *Heavey*, a pre-*Tashjian* case, placed the burden on the plaintiffs to show a substantial burden to their associational rights. *Tashjian*, however, places the burden on the State to show a compelling State interest and narrowly-tailored law. Contrary to *Tashjian*, the *O'Callaghan*

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[13] The dissenting opinion of Justice Rabinowitz is correct as a matter of federal constitutional law.

majority placed the burden on the RPA to show a substantial burden to its associational rights. The majority decided against the RPA because it did not make such a showing. However, the Court gave the RPA no opportunity to make a record before the trial court.

The alleged State interests cited by the *O'Callaghan* majority do not justify the State's infringement on the RPA's associational rights. First, the majority cites three justifications from *Heavey v. Chapman*, 611 P.2d 1112 (Wash. 1980). These are (1) secrecy, by allowing each voter to keep party identification, if any, secret; (2) greater voter participation by allowing the broadest possible participation in the primary election; and (3) maximizing voter choice by giving each voter a free choice among all candidates in the primary. (914 P.2d 1250 at 1257).

Secrecy is not a valid justification. In Alaska, each registered voter's party identification, if any, is a matter of public record available for public inspection. Greater voter participation is not necessarily encouraged by a blanket open primary election. In fact, voter participation would logically increase in "closed" party primary elections because the primary elections would be a more meaningful method of choosing candidates. Finally, maximizing voter choice is an interest which is applicable to the general election. Voters in a primary election should not be allowed to freely choose among candidates of an opposing party, because the purpose of the primary election is for each party to select its candidates in its chosen manner.

The majority opinion also holds that the State has a legitimate interest in forcing the major political parties to have a broad cross-section of support from the voters, by forcing the parties to accept voters of opposing political

parties in their primary elections. (914 P.2d 1250 at 1262). The majority observes that in Alaska, where a majority of the voters are not affiliated with any party, a closed or partially closed primary system can be viewed as bestowing a disproportionately powerful role in the selection of public office holders on a minority of the electorate, and that this is power taken from unaffiliated voters. (914 P.2d 1250 at 1262). This is nonsense as a matter of Constitutional law.

The right of individuals who organize should not be abrogated in order to strengthen the political power of the unaffiliated. Political power of those individuals who care enough to actively participate in the political process should not be destroyed. This alleged dilution of the power of the unaffiliated would not occur under the RPA rules. The RPA rules allow unaffiliated voters to participate in the Republican primary election. The only political power lost when the RPA rule was implemented was the power of Democrats and members of other political parties to interfere in the Republican primary election.

O'Callaghan also conflicts with the 1992 tentative decision in *Zawacki v. State*, A92-414 CV (D. Alaska 1992). In his tentative decision, Judge Singleton correctly relied on *Tashjian*, stating that the Alaska blanket primary statute infringed the RPA's associational rights (App. 3-4) and that the Lieutenant Governor had the authority to promulgate regulations implementing the principles enunciated in *Tashjian*. Judge Singleton's tentative decision was the basis for the stipulation to conduct the 1992 Republican primary in accord with the RPA Rule.

The right to free political association of all Alaskan political parties has been violated in a manner contrary to prior decisions of this Court and the United States District Court for the District of Alaska. The decision of the

majority of the Supreme Court of Alaska is wrong on an important matter of federal constitutional law. This petition for certiorari should be granted in order to provide appropriate protection to the First Amendment rights of Alaskan political parties in the future.

II. REQUIRING THE RPA TO ALLOW DEMOCRATS AND MEMBERS OF OTHER POLITICAL PARTIES TO SELECT REPUBLICAN CANDIDATES, AND TO COMPLETELY DENY THE OTHER TWO POLITICAL PARTIES THEIR RIGHT TO OPT OUT OF THE PRIMARY ELECTION, SEVERELY HARMS THE RIGHT TO FREE POLITICAL ASSOCIATION OF ALL PARTIES AND THEIR MEMBERS.

Individuals organize into political parties for the purpose of nominating and electing candidates to represent the individuals' principles and goals. The basic purpose of a political party is to elect candidates to public office. Selection of candidates is the very essence of political expression. Candidate selection translates the appeal to common principles and objectives into concerted action to advance these principles and attain these goals. Nothing is more basic to this right than that the parties themselves determine the manner by which their candidates shall be selected and who may participate.

The first major purpose of the RPA in changing its primary election process was to prevent the Democrats from selecting the weakest Republican candidate in the Republican primary election, so that the Democrats could defeat the weak Republican candidate in the general election. A system which allows party members to select the worst candidates of the opposing party to be candidates in the general election does not lead to good candidates being selected, nor to good government.

A classic example of the cross-over problem was the Alaska primary election in 1984 for House District 14, Seat A. The only Democratic candidate was James Duncan. Ramona Barnes and Marco Pignalberi were the two Republican candidates. Ramona Barnes, the incumbent, was a senior legislator, and the leader of the Republicans in the Alaska House of Representatives. As such, she was a top Democratic target. In the blanket primary, James Duncan received only 329 votes. Marco Pignalberi defeated Ramona Barnes by a vote of 2816 to 1819. The extremely low number of voters in the Democratic primary election shows a massive Democratic cross-over which defeated the House Republican leader.

In the 1990 primary election for Senate District F-B, no candidate ran as a Democrat. The Republican candidates were Jan Faiks, former Republican Senate President, and Virginia Collins, a Republican member of the House of Representatives. Jan Faiks, a Republican leader, was a Democratic target. Since the Democrats did not field a candidate, almost all Democrats crossed-over into the Republican primary election, resulting in Jan Faiks' defeat by a 53% to 47% voting margin. Cross-over voters also affected the election for governor of Alaska in 1978. Democratic voters crossing into the Republican primary election allowed Jay Hammond, a Republican legislator, to defeat Walter J. Hickel, former Secretary of the United States Department of the Interior and former Governor of Alaska. In the 1978 gubernatorial primary election, 24,675 individuals voted for Democrats and 81,632 persons voted for Republicans. Again, the low number of voters in the Democratic primary shows a massive cross-over of Democrats into the Republican primary election.

Democrats also crossed into the Republican primary election for United States senator in 1974. Mike Gravel

was the only Democratic candidate. The two Republican candidates were C.R. Lewis, a leader of the John Birch Society, and Terry Miller, a moderate. Democratic cross-over voters gave C.R. Lewis the victory in the Republican primary election. As an extreme conservative, Mr. Lewis was unacceptable to most of the electorate. Mike Gravel, the Democrat, then won the general election.

Mike Gravel, the incumbent, and Clark Gruening were the two Democratic candidates in the 1980 United States Senate race. A Republican cross-over vote resulted in Clark Gruening defeating Mike Gravel. The Republican candidate, Frank Murkowski, then won the general election, and presently serves in the United States Senate. In this election, 72,368 persons voted Democratic, while only 27,632 persons voted Republican. There were six Republican candidates in that primary election. Nevertheless, Republicans crossed over into the Democratic primary election in order to defeat the incumbent senator, Mike Gravel.

A comparison of the vote in the 1980 senatorial primary with the vote in the 1978 gubernatorial primary, illustrates the magnitude of cross-over voting:

Primary Election	Republican	Democrat
1978 Gubernatorial	81,632	24,675
1980 U.S. Senate	27,632	72,368

The RPA had solved the cross-over voting problem by adopting rules to exclude declared political opponents from the Republican primary. However, the RPA can no longer do so, and Alaska has returned to the system whereby party members may select the weakest candidate of the opposing party to represent the opposing party in the general election.

A second major purpose of the RPA primary election rules is to prevent elected Republican legislators from abandoning their Republican colleagues by joining leadership coalitions dominated by Democrats. In the 1990 election, enough Republicans were elected to form a Republican majority in the Alaska Senate. However, certain Republicans desired benefits for themselves, which they might not have received from the Republican majority. Accordingly, three Republican legislators abandoned their Republican colleagues and entered into a coalition dominated by Democrats in order to obtain leadership roles for themselves. As the new RPA rule was in place for the 1992 Republican primary, none of the three 1990 defectors were re-nominated as Republicans. Democrats could not reward the Republican defectors with votes in the Republican primary. Republican voters elected other candidates, and there has not been a defection since. In fact, largely because of the discipline imposed by the primary rule, Republican legislators have been in the majority in both the Alaska House and Senate since the rule was implemented.

The right of the RPA to exclude Democrats and members of other political parties from its primary election is also crucial for another reason. Many elections in Alaska are decided by very close margins. For example, present governor Tony Knowles was elected by a plurality vote of approximately one vote per precinct in the 1994 Alaska gubernatorial election. In a state where close elections are the norm, allowing the 23% of voters who are declared political opponents of the RPA into the Republican primary election allows these opponents an unusual power to adversely affect the Republican outcome.

The Republican Party firmly believes that Republican legislators do a better job when they are evaluated in the next primary election by Republican and independent voters. There is much less incentive for a Republican legislator to adhere to the precepts of the Republican Party when the legislator is being evaluated by a group which includes a substantial number of Democrat and other political party members.

The Republican Party did not make these changes in its primary election process lightly or arbitrarily. The Republican Party believes that these changes will lead to politicians acting in a more responsible manner and acting in a manner more responsive to their constituents. This will lead to better government. This principle is crucial to Republican politics, and the continuation of a partially closed Republican primary is necessary to accomplish this goal. Republican primary elections, or Democrat or other party primary elections for that matter, should not be decided by voters of an opposing party.

The blanket primary statutes of Alaska force the RPA to affiliate politically with registered voters of other political parties for the purpose of selecting candidates to represent the Republican Party in the general election. If the right to free political association means *anything*, it means *at* least that all political parties have the right to exclude "the enemy" from the candidate selection process, or to use a process which does not involve the primary election. The nature of the constitutional right involved, the infringement on it, and the severe harm to all Alaskan political parties require that this Court grant this petition for certiorari and protect the right of these parties and their members to free political association.

The Alaskan Independence Party and the Alaska Libertarian Party want to be able to nominate their candidates by convention or committee. This is also their right under the prior cases of this Court, referenced above.

A blanket primary is, in fact, most destructive to the minor parties. These parties have relatively small numbers of registered voters. The massive numbers of voters of other persuasions, should they vote for a minority party candidate, can simply overwhelm the minor party, and deny those parties' members the right to choose their own nominees. In fact, this actually took place in the 1998 gubernatorial primary election of the Alaskan Independence Party.

The winner of the AIP primary election for governor was Sylvia Sullivan. Ms. Sullivan was a Democrat, who changed her party registration to AIP solely for the purpose of running for governor as an AIP candidate. She would not subscribe to the platform and beliefs of the AIP, and would not even attend AIP meetings. The AIP objected to Ms. Sullivan as its candidate, refused to endorse her, and actually endorsed the Republican candidate, John Lindauer. Voters of other political parties assisted in the victory of a Democrat in the AIP gubernatorial primary. The AIP objected, and continues to object, to the blanket primary election system which selected Ms. Sullivan, a Democrat, as its gubernatorial candidate.

It is extremely easy to understand why the smaller Alaskan parties need to protect themselves by opting out of the primary election process. After all, the process selects candidates that the parties may not want or support. The right of free political association guarantees

them this right to opt out, without preventing these parties from being able to place their chosen candidates on the general election ballot.

III. THE ISSUES INVOLVED ARE CRUCIAL TO ALASKA, CALIFORNIA, AND THE NATION.

Alaska

Voters form political parties in order to advance their political beliefs. The major method for the parties to do this is to select candidates who represent the beliefs and philosophies of the members, and secure the election of these candidates to public office. The First Amendment to the Constitution of the United States guarantees the people the right to advance their political beliefs in this manner. The law of Alaska severely and impermissibly infringes on the right of the people and political parties to do this.

The Alaska law applicable to the rights and abilities of Alaskan political parties to select their candidates to represent their interests can be summarized as follows:

(1) The parties have no control over who will run as party candidates in their own primary elections. These candidates designate themselves as the party standard bearers. (AS 3.5.25.030) A candidate may even change party registration on the same day as filing a declaration of candidacy.[14] The parties must allow these self-

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[14] In fact, some years ago, Alaska had a candidate running for state office as a candidate of one of the major political parties. This candidate changed his party registration to that of the other major party ten minutes prior to the filing deadline, so that he could run for office as a member of the party that he secretly wanted to represent and that he would have no opponent from the other party. Although extreme, this is typical

designated candidates to run under the party name, and cannot get rid of them even if they are totally unacceptable to the party.

(2) The parties have no control over who may vote in their primary elections. (*O'Callaghan v. State*, 914 F.2d 1250 (Alaska 1996), AS 15.25.040 et seq.) In the past, candidates representing political parties in the general elections have been selected by voters of opposing parties through cross-over voting.

(3) The parties cannot even protect the use of their own party names to avoid confusion and misrepresentation. (*Republican Party of Alaska v. Metcalfe*, Case No. 3AN-86-11714 (Sup. Ct., 3rd Jud. Dist., Alaska 1986)) As a result, both the real Republican Party and a "Republican Moderate" party (supported in part by the Democrats), are now both ballot-qualified. Candidates of the Republican Moderate Party will appear for the first time on the 2000 Alaska primary and general election ballots in opposition to candidates of the real Republican Party.

The fact that the parties have no control over who may vote in their primary elections has been the subject of a decade of litigation in Alaska, and the litigation is continuing. Since the claims of the Alaskan Independence Party and the Alaska Libertarian Party were dismissed for lack of case or controversy, they will be filing new litigation in the Alaska District Court to determine their rights for the 2000 primary and general elections. The RPA has lost a trial court action seeking to protect its exclusive use of the "Republican" designation. No Alaskan parties have specifically litigated the issue of self-

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of the mischief that is sometimes performed under the Alaska method of candidate selection.

selection of candidates. If the parties have no right to determine who their voters are going to be, then they will have to litigate the question of whether they have the right to select their candidates. Both of these issues are directly related. A decision by this Court dealing with the right of free political association as it applies to party selection of primary election voters is needed to control future litigation on that subject, and guide the parties in determining how to deal with the issue of candidate selection.

In its petition for certiorari in *Republican Party of Alaska v. O'Callaghan*, Docket No. 95-1962, and in this petition, the RPA cited several examples of how cross-over voting, allowed by the Alaska statutes, harmed the political parties in their right to choose their own candidates. The problems did not exist during the 1992 and 1994 elections, which were conducted according to RPA rule. The 1996 elections were uneventful. The problems returned with a vengeance in the 1998 elections, however, for both the RPA and the AIP.

The AIP problem with Ms. Sullivan has previously been referenced in this petition. The RPA had a much more serious problem. In 1998, John Lindauer came to Alaska with millions of dollars in Chicago money to buy the governorship. He decided to run for governor as a Republican. In the past, he had run for governor as an AIP candidate.

The major candidates in the Republican gubernatorial primary election were John Lindauer, Robin Taylor, and Wayne Ross. Mr. Taylor and Mr. Ross were conservative Republicans who had been active in the Republican Party for many years. Mr. Taylor is a State Senator and Mr. Ross was a member of the Republican National Committee. Mr. Lindauer had access to out-of-

state money and was able to spend millions of dollars to become governor. Mr. Ross and Mr. Taylor had difficulty raising money because of the Alaskan Campaign Finance Act, and could not compete financially with Mr. Lindauer. In addition, Ross and Taylor split the conservative Republican vote. Mr. Lindauer was selected as the Republican candidate. He would have lost to either Mr. Ross or Mr. Taylor had only one of them been running.

In this Republican primary election, a classic cross-over voting situation existed. The Democrats had one strong candidate running in the Democrat gubernatorial primary election. His victory was certain. Mr. Lindauer was known to be the Republican candidate who the Democrats could defeat most easily. Cross-over voting took place in the Republican primary, which assisted in the victory of Mr. Lindauer, although it cannot be said that this was the only reason that Mr. Lindauer won.

Once Mr. Lindauer won the Republican primary, his candidacy began to disintegrate almost immediately over questions relating to his residence, the source of his money and his continued lying. Chuck Achberger, a former employee of the Lindauer campaign, filed a complaint with the Alaska Public Offices Commission, over Mr. Lindauer's finances and his required reporting. An independent voter, Frances Grady, filed a lawsuit in the Alaska Superior Court, dealing with the same issues. (*Grady v. State*, Case No. 3AN-98-9720 CI) Both these complaints requested that Mr. Lindauer's name be removed from the general election ballot. Neither the Alaska Public Offices Commission or the court resolved the proceedings before them prior to the 1998 general election.

The disintegration of the Lindauer campaign affected not only his campaign, but also the campaigns of Republican candidates across the board. It also affected the credibility and integrity of the Republican Party itself. Fewer than two weeks prior to the general election, after some weeks of the only issue being "Lindauer", the Republican Party accepted the fact that it had to write-off any chance to elect a Republican governor in 1998. The RPA had to disavow Mr. Lindauer in order to save the party from a massive defeat across the entire spectrum of elective offices. The RPA withdrew its endorsement from Mr. Lindauer and recommended that voters write in Mr. Taylor for governor. Mr. Taylor received the second-highest number of votes in the Republican gubernatorial primary. The Republican Party of Alaska had never before been forced to withdraw an endorsement of one of it gubernatorial candidates in a general election. The RPA objected and continues to object to a statutorily mandated election process which forces it to accept a candidate such as Mr. Lindauer as its standard bearer in the general election.[15]

The rules of the RPA, the AIP, and the Libertarian Party of Alaska continue to be in conflict with the Alaska

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[15] After the 1998 general election, the Alaska Public Officer commission, in ruling on the Achberger complaint, found numerous campaign law violations and referred the Lindauer matter to the Attorney General's office to consider criminal prosecution. In August, 1999, the Attorney General of Alaska filed a complaint charging Mr. Lindauer with twenty-three (23) violations of law which occurred during his campaign, including twenty-two (22) class A misdemeanors and one felony. *State v. Lindauer*, Case No. 3AN-997041 CR. This criminal complaint is still pending.

blanket primary statute.[16] These parties, plus others, will have candidates on the primary and general election ballots in 2000. The problems caused by the conflict between the party rules and the Alaska blanket primary statute will arise again in 2000, and every two years thereafter. Litigation will continue. However, the factual situation is

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[16] The RPA has an additional problem. After the *O'Callaghan* decision, the Republican National Convention adopted National Rule 34(f), which reads as follows:

> Rule 34 (f) – On or after January 1, 1997, no state law or party rule shall be observed that allows persons who have participated or are participating in the selection of any nominee of a party other than the Republican Party, including, but not limited to, through the use of a multi-party primary or similar type ballot, to participate in the selection of a nominee of the Republican Party for that general election. No person nominated in violation of this rule shall be recognized as the nominee of the Republican Party. If state law or state party rule provides for the selection of the nominee of the Republican Party in violation of this rule, the Republican nominee shall be selected by a convention convened and held under the provisions of Rule No. 32(c), unless a state party rule provides specifically to the contrary.

This rule is binding on the RPA, and could prevent any Republican candidate from being placed on the general election ballot in Alaska for the 1998 and future elections. In fact, the rule was not enforced against the RPA for the 1998 general election, but still remains effective for possible enforcement against it in the future. If it is enforced, the RPA will not be able to run *any* candidates under the Republican name in the future. Individuals will still have the right to usurp the Republican name under Alaska law, however. Individuals to whom the party objects will be able to run as Republicans, but the RPA will not be able to use the Republican name to support candidates whom it deems worthy of support.

different each time, and by the time the facts have developed, it becomes impossible to obtain relief for a particular election because of lack of time.

This Court appears to have reaffirmed the vitality of *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), and that the parties have the right to select their standard bearers. (*Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)) However, as discussed by Justice Rabinowitz in his dissent in *O'Callaghan*, the principles of *Tashjian* are being ignored in Alaska.

The Alaskan political parties and their members need relief in the form of a final federal decision interpreting and protecting the federal Constitutional right of free political association. This is needed now in order to know the law applicable to determination of who may vote in future primary elections, and to make a determination as to how to deal with the related issue of the parties' inability to select their own candidates.

California

In their petition for certiorari in *California Democratic Party v. Jones*, Docket No. 99-401, the California petitioners have clearly pointed out why a decision is needed to protect the rights of the California parties, in particular the minor parties. The petitioners here, who filed an amicus brief in support of the granting of the petition for certiorari in *California Democratic Party v. Jones*, concur with the views expressed in that petition.

Nationally

California is one of the most important states of the United States. For better or worse, trends and ideas which begin in California often spread across a large part

of the country. The use of the initiative or legislative process to impose blanket primary election in other states is one of these ideas and trends which can be expected to spread.

Arguments in favor of a blanket primary are very seductive, and the actual effect of the process is greatly misunderstood. For example, in the face of declining voter participation in the political process in the United States, proponents of a blanket primary will argue that people will be more interested in and will participate in the political process because they will be able to "vote for the person and not the party." Voters will be told that they will have more input into the political process. In fact, a blanket primary will remove much of the power from the voters to implement any policy or program. Since the candidate is not responsible to a group of voters with a coherent philosophy or program, but is elected by an amorphous group of people of various motivations, the office-holder will not represent any philosophy or program of anyone, but will have to try to please everyone in order to be reelected. This does not result in good government by and for the people.

There are very real problems with the blanket primary system, which are well recognized, such as raiding and lack of accountability to voters. Additionally, the blanket primary system is unquestionably a serious infringement on the First Amendment right of free political association. Finally, under *Tashjian* and *Timmons*, it appears that the blanket primary system is impermissible if contrary to the rules of the political party upon which the state desires to impose the system.

Before this system spreads any further, over the objections of the affected political parties and individuals, the issues involved and the applicable parameters

need to be determined by this Court. It is bad enough that there has been a decade of litigation in Alaska, and that litigation has been filed in California immediately upon the implementation of the blanket primary system. If there is no resolution of the issues and parameters at this time, the system can be expected to spread into additional states with additional uncertainty and litigation. There is no advantage or public interest in allowing this to happen.

CONCLUSION

The petition for writ of certiorari should be granted, and the opinions of the Court of Appeals for the Ninth Circuit in *California Democratic Party v. Jones* and in the case at bench reversed. This Court should issue an opinion protecting the right of all political parties to determine the methods by which their candidates are selected, regardless of whether selection is done through a type of primary election, nomination is done by convention or party committee, or is done in a different manner desired by a party.

Respectfully submitted,

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Wayne Anthony ROSS; The Republican Party of Alaska, Inc.; The Alaska Libertarian Party; The Alaskan Independence Party; Mark Chryson; Linda S. McKay, Plaintiffs-Appellants,

v.

STATE OF ALASKA; State of Alaska, Division of Elections; Lieutenant Governor Fran Ulmer, in her official capacity of Supervisor of Elections; SANDRA J. STOUT, in her official capacity of Director of the Division of Elections; Jane/John Doe, 1 through 10, Defendants-Appellees.

No. 98-35720

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 2, 1999
Filed Sept. 2, 1999

Kenneth P. Jacobus, Kenneth P. Jacobus, Anchorage, Alaska, for the plaintiffs-appellants.

James L. Baldwin, Assistant Attorney General, Juneau, Alaska, for the defendants-appellees.

Appeal from the United States District Court for the District of Alaska. H. Russel Holland, Chief District Judge, Presiding, D.C. No. CV-95-00053-HRH.

Before: Procter Hug, Jr., Chief Judge, Stephen S. Trott and A. Wallace Tashima, Circuit Judges.

HUG, Chief Judge:

The Republican Party of Alaska, Wayne Anthony Ross, and Linda S. McKay (collectively, "Republican Party"), and the Alaska Libertarian Party ("ALP"), the Alaskan Independence Party ("AIP"), and Mark Chryson (collectively, "minor parties") appeal the judgment of the

district court dismissing this case. Appellants brought suit challenging Alaska's "blanket primary" system of determining the nominees of political parties. *See* Alaska Stat. §§ 15.25.010-205 (Michie 1989). The district court granted partial summary judgment to defendants State of Alaska, et. al. ("the State") with regard to the Republican Party, holding that the doctrine of issue preclusion barred the Republican Party from relitigating certain issues decided by the Alaska Supreme Court in *O'Callaghan v. State*, 914 P.2d 1250 (Alaska 1996). The district court also dismissed the claims of the minor parties because they failed to demonstrate the existence of an actual case or controversy. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we AFFIRM.

FACTUAL AND PROCEDURAL BACKGROUND

The issue in this lawsuit is the asserted unconstitutionality of Alaska's "blanket primary" system of determining which candidates will represent political parties in the general election. A blanket primary places all candidates of every political party on the same ballot, and allows voters to vote for any candidate regardless of the voter or candidate's party affiliation. Thus, a registered Republican could vote for an Alaskan Independence Party candidate for Governor, a Republican candidate for United States House of Representatives, and a Democratic candidate for State Senate. *See O'Callaghan*, 914 P.2d at 1254-55. Appellants assert that this system unconstitutionally infringes upon their First and Fourteenth Amendment rights to free political association, right to petition, and right to due process. Therefore, they request

a declaratory judgment to that effect, as well as an injunction prohibiting the State from conducting primary elections in any manner other than in conformance with the rules of the political parties.

The initial complaint in this action was filed on February 16, 1995. On February 17, 1995, the Republican Party intervened in the *O'Callaghan* case, an action in the Alaska Supreme Court which also challenged the constitutionality of the blanket primary. In *O'Callaghan*, the Alaska Supreme Court upheld the blanket primary system, employing a balancing test and concluding that the benefits to the State of such a system outweighed the burdens on the rights of the political parties. 914 P.2d at 1261-63.

A third amended complaint in this case was filed in the federal district court on July 31, 1997. On February 10, 1998, the district court issued an order on the State's motion for partial summary judgment, ruling that issue preclusion barred the Republican Party from relitigating issues decided in the *O'Callaghan* case. In making this ruling, the district court also held that the doctrines of claim and issue preclusion did not affect the minor parties' suits. However, on April 3, 1998, the district court granted the State's motion to dismiss the minor parties, concluding that no case or controversy existed with respect to these parties. A final judgment as to all issues and all parties was issued on July 13, 1998, and Appellants filed a timely appeal on July 22, 1998.

DISCUSSION

This appeal involves challenges to two separate rulings of the district court: (1) the grant of partial summary judgment to the State on the basis that "issue preclusion" prevents the Republican Party from relitigating the issues decided in *O'Callaghan*; and (2) the dismissal of the claims of the minor parties for lack of a case or controversy.

I. Issue Preclusion and the Republican Party

The district court's holding that the Republican Party was barred from relitigating issues decided in *O'Callaghan* encompassed the following issues: (1) whether "Alaska's primary laws are per se unconstitutional if the laws conflict with the rules of the political parties; (2) whether Alaska's blanket primary requirement violates these plaintiffs' First and Fourteenth Amendment rights; and (3) whether the State of Alaska must alter its primary election laws to conform with Article XIV, Section 1 of the Rules of the [Republican Party of Alaska]."[1] The Republican Party challenges this ruling with respect to issues (2) and (3). "The district court's grant of summary judgment on res judicata grounds is reviewed de novo." *Hiser v. Franklin*, 94 F.3d 1287, 1290 (9th Cir.1996).[2]

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[1] Article XIV, Section 1 of the Republican Party of Alaska rules provides that "[o]nly registered Republicans, registered Independents, and those who state no preference of party affiliation shall be allowed to vote in the Republican primary election for Governor, Lieutenant Governor, U.S. Senator, U.S. Representative, and members of the State Legislature."

[2] While the term "res judicata" is often used to refer specifically to "claim preclusion," it is also sometimes used to

A. Application of Issue Preclusion

" 'It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered.' " *Id.* (quoting *Migra*, 465 U.S. at 81).[3] Therefore, Alaska law with regard to issue preclusion applies to the determination of the preclusive effect of the *O'Callaghan* case. Under Alaska law,

> issue preclusion prohibits a party from relitigating an issue where: (1) the party against whom the preclusion is employed was a party to or in privity with a party to the first action; (2) the issue precluded from relitigation is identical to the issue decided in the first action; (3) the issue was resolved in the first action by a final judgment on the merits; and (4) the determination of the issue was essential to the final judgment.

Wilson v. Municipality of Anchorage, 977 P.2d 713, 726 (Alaska 1999); *Jackinsky v. Jackinsky*, 894 P.2d 650, 654 (Alaska 1995).

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encompass both "claim preclusion" and "issue preclusion." However, "issue preclusion" is also commonly referred to as "collateral estoppel." Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that ha [sic] already been litigated or decided, while claim preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit. *See Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n. 1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984); 18 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4402 (1981). *Hiser*'s description of the standard of review encompasses both claim and issue preclusion. *See Hiser*, 94 F.3d at 1290.

[3] There are several exceptions to this general principle, which are discussed in Part I.B, below.

The Republican Party does not and cannot contest elements (1), (3), and (4). However, it does argue that the issues in this case are not identical to the ones decided in *O'Callaghan* due to events occurring after that case was decided which change the "balance" evaluated in *O'Callaghan*. Specifically, the Republican Party points to the national Republican Party's passage of National Rule 34(f), which provides that no candidate nominated under a system which allows persons who are participating in the selection of nominees of other parties to participate in the selection of Republican nominees will be recognized as a nominee of the Republican party. It further provides that if a state law or state party rule provides for the selection of a Republican nominee in violation of this rule, the Republican nominee will be selected by convention, unless a state party rule provides specifically to the contrary.[4] Another event which changes the issues involved in this case, according to the Republican Party, is Alaska's 1998 gubernatorial primary election, which

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[4] The full text of Rule 34(f) reads: "On or after January 1, 1997, no state law or party rule shall be observed that allows persons who have participated or are participating in the selection of any nominee of a party other than the Republican Party, including, but not limited to, through the use of a multi-party primary or similar type ballot, to participate in the selection of a nominee of the Republican Party for that general election. No person nominated in violation of this rule shall be recognized as a nominee of the Republican Party. If state law or state party rule provides for the selection of the nominee of the Republican Party in violation of this rule, the Republican nominee shall be selected by a convention convened and held under the provisions of Rule No. 32(c), unless a state party rule provides specifically to the contrary."

the Republican Party asserts shows the dangerous effects of cross-over voting.

Restatement (Second) of Judgments § 27 cmt. c (1982)[5] sets forth four factors to be considered in determining whether the issue in a proceeding is identical to an issue previously litigated:

> [1] Is there a substantial overlap between the evidence or argument to be advanced in the second proceeding and that advanced in the first? [2] Does the new evidence or argument involve application of the same rule of law as that involved in the prior proceeding? [3] Could pretrial preparation and discovery relating to the matter presented in the first action reasonably be expected to have embraced the matter sought to be presented in the second? [4] How closely related are the claims involved in the two proceedings?

Using these elements as guidelines, it is clear that the issues in this case are identical to those decided in *O'Callaghan*. First, there is substantial overlap in the evidence and arguments, with the only differences being the two changes in circumstances described above. In addition, the same rule of law, a balancing test evaluating the interests of the State and the interests of the parties, would apply to both proceedings.[6] Finally, the claims

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[5] Alaska courts generally follow Restatement (Second) of Judgments (1982). *See Hiser*, 94 F.3d at 1290.

[6] Like the Alaska Supreme Court in *O'Callaghan*, this circuit employs a balancing test to determine whether a blanket primary infringes upon the rights of the political parties. *See California Democratic Party v. Jones*, 169 F.3d 646, 653 (9th Cir.1999).

involved in the two proceedings are entirely based on a determination of whether of not Alaska's blanket primary is constitutional.

The "changes" set forth by the Republican Party do not change the conclusion that the issues in this case are identical to those resolved in *O'Callaghan*. For example, the Republican Party National Rule 34(f) is intended to advance the same interests identified in *O'Callaghan* – reducing the effect of raiding and promoting party accountability – and the Republican Party does not identify any new interests which the rule seeks to achieve. Moreover, while the Republican Party argues that it may not be able to place any candidates recognized as Republican candidates by the national party on the general ballot, the state party can avoid this result by adopting contrary rules for the selection of its nominee which conform to Alaska law. Finally, the national Republican Party has thus far not applied this rule to prevent a candidate from being recognized as a nominee of the party. Therefore, the passage of Rule 34(f) does not foreclose the application of issue preclusion in this case.

Similarly, the facts of the 1998 primary election do not preclude the application of issue preclusion in this case. The court in *O'Callaghan* acknowledged that there was merit to the position that the danger of raiding exists under a blanket primary. *See* 914 P.2d at 1261. However, the court concluded that the associational burdens on the political parties were outweighed by the state's interests in a blanket primary. *See id.* at 1261-63. Evidence of cross-over voting in the 1998 primary does not affect this

analysis.[7] This is particularly true because the Republican Party cites numerous examples where cross-over voting may have affected primaries which took place before *O'Callaghan* was decided. Therefore, we conclude that the issues that the district court found to be precluded are identical to those decided in *O'Callaghan*, and that all of the elements set forth under Alaska law for applying issue preclusion on the basis of *O'Callaghan* are satisfied in this case.

B. Exceptions to Issue Preclusion

Although the elements for applying issue preclusion under Alaska law are present in this case, the Republican Party urges us to apply several federal exceptions to this doctrine which would allow them to litigate the issues that the district court determined to be precluded by *O'Callaghan*.

First, the Republican Party argues that it did not have a full and fair opportunity to litigate the issues in *O'Callaghan*, and therefore issue preclusion should not apply. *See, e.g., Haring v. Prosise*, 462 U.S. 306, 313, 103 S.Ct. 2368, 76 L.Ed.2d 595 (1983); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81, 102 S.Ct. 1883, 72 L.Ed.2d 262 (1982). The basis for this argument is that the Republican Party did not join the case until it was before the Alaska Supreme Court, and therefore it did not have the opportunity to develop a record. The Republican Party argues that this

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[7] The Republican Party concedes that it cannot demonstrate that cross-over voting affected the result in the 1998 Republican primary.

fact is particularly significant because *O'Callaghan* employed a balancing test, and the development of a record could have changed this balance.

In determining whether the Republican Party had a full and fair opportunity to litigate these issues, we are mindful of the principle that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. In this case, the Alaska Supreme Court accepted the contentions of the Republican Party that the possibility of raiding and loss of party accountability burdened the Party's associational rights. *See O'Callaghan*, 914 P.2d at 1261. Moreover, the Republican Party fully briefed and argued its position before the Alaska Supreme Court (as well as before the United States Supreme Court in its petition for certiorari), and fails to point to facts that it was unable to present or how these facts would have affected the outcome. Therefore, we conclude that the Republican Party had a full and fair opportunity to litigate the issues decided in *O'Callaghan*.

The Republican Party's other arguments may be disposed of quickly.[8] First, it asserts that issue preclusion is inappropriate in this case because it had "no choice but to

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[8] In addition to the exceptions discussed below, the Republican Party argues that there is an exception where controlling facts or legal principles have changed significantly since the state court judgment. *See Haring*, 462 U.S. at 313 n. 7. However, the arguments in this regard are identical to the ones discussed above in Part I.A.

intervene before the Supreme Court of Alaska because the constitutional rights of the Republican Party and its members were at stake," and therefore it did not "freely and without reservation submit[ ] its federal claims to the state court." *Haring*, 462 U.S. at 313-14 n. 7; *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 419, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964). However, this exception does not apply because the Republican Party did not have to intervene in the *O'Callaghan* action. For example, it could have participated as amicus curiae, or declined to participate at all and pursued its complaint in federal court.

The Republican Party also argues that the *"Red Fox"* exception should apply, because the state court's decision was transparently erroneous. However, this exception, described in dicta in *Red Fox v. Red Fox*, 564 F.2d 361, 365 (9th Cir.1977), is explicitly based upon the Indian Civil Rights Act and the "unique historical relationship between the American Indian and the federal government." Moreover, the determination of the state court in *O'Callaghan*, applying a balancing test to find that Alaska's blanket primary was not unconstitutional, was not "transparently erroneous." This determination was based upon a permissible interpretation of United States Supreme Court precedent, a conclusion bolstered by the fact that this circuit also applied a balancing test in upholding California's blanket primary system. *See California Democratic Party*, 169 F.3d at 653.

Finally, the Republican Party argues that issue preclusion should not be applied because the state court was "unwilling or unable to protect federal rights." *Haring*,

462 U.S. at 314. Examples of situations where this exception may apply are when the state court "did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim." *Allen v. McCurry*, 449 U.S. 90, 101, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980). Beyond the denial of a full and fair opportunity to litigate, discussed above, the Republican Party does not assert that the Alaska Supreme Court failed to provide fair procedures or failed to acknowledge the existence of the relevant constitutional principles. The fact that the Republican Party disagrees with the decision in *O'Callaghan* falls far short of triggering this exception, and we therefore conclude that this argument is without merit.

On the basis of the foregoing discussion, we conclude that the district court properly found that Alaska law required the application of issue preclusion on the basis of *O'Callaghan*, and that none of the exceptions set forth by the Republican Party are applicable. Accordingly, we affirm the district court's partial grant of summary judgment to the State on this basis.

II. Lack of Case or Controversy/Ripeness-AIP and ALP

The second basis for this appeal is the minor parties' challenge to the district court's grant of the State's motion to dismiss. We review de novo a district court's decision to dismiss a complaint for lack of ripeness. *See Municipality of Anchorage v. United States*, 980 F.2d 1320, 1322-23 (9th Cir.1992). Where the plaintiffs seek declaratory and injunctive relief, the relevant inquiry is whether there is a

"substantial controversy . . . of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (9th Cir.1991) (quoting *Maryland Cas. Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826 (1941)) [emphasis in original]. The minor parties argue that the dismissal was erroneous because they both presented actual cases or controversies. We disagree.

A. Alaskan Independence Party

In support of its argument that the district court erred in finding that this action is not ripe, the minor parties point to the AIP's adoption of Bylaw 5.15, which provides: "In any election for public office where the Alaskan Independence Party is authorized by law to nominate a candidate, the State Committee shall be empowered to present a nominee in the name of the Alaskan Independence Party, or to reject any candidate not an Alaskan." The minor parties argue that this conflicts with Alaska Statute § 15.25.030, which allows candidate self-selection by filing a declaration of candidacy. However, as recognized by the district court, this bylaw only comes into play if state law authorizes the party to nominate a candidate. For example, if an unopposed incumbent candidate dies, becomes incapacitated, or is disqualified, that candidate's place on the ballot may be filled through a party petition. *See O'Callaghan*, 914 P.2d at 1255 n. 6; Alaska Stat. §§ 15.25.056, 15.25.110 (Michie 1989). Under those circumstances, the nominee would be selected by the party's central committee or by a manner prescribed in the bylaws. *See* Alaska Stat. § 15.25.130 (Michie 1989). This is the situation addressed by Bylaw

5.15. However, this is the only circumstance where the AIP would be authorized by law to nominate a candidate – in all other cases the eligible voters of Alaska would do so. *See* Alaska Stat. § 15.25.010 (Michie 1989) ("Candidates for the elective state executive and state and national legislative offices shall be nominated in a primary election by direct vote of the people in the manner prescribed by this chapter."). Therefore, Bylaw 5.15 does not conflict with Alaska laws providing for a blanket primary.

The minor parties also cite Article IX, Section 9.02 of the AIP rules as being in conflict with state law. This section provides that:

> The fact that a voter has voted in the Alaskan Independence Party Primary Election shall not disqualify that voter from voting in the primary election of any other political party or parties where that voter's participation in the primary election of the Alaskan Independence Party is authorized or permitted by the rules of the other party, or by the statutes of the United States or the State of Alaska.

The minor parties argue that this rule requires that a voter be able to vote for a candidate of his party and also a candidate of another party for the same office, and that this conflicts with Alaska's blanket primary laws. However, there is nothing in the language of Section 9.02 which supports such a construction. In fact, this rule actually supports a blanket primary. Under this rule, just as in a blanket primary, voting for an AIP candidate for Governor would not disqualify a voter from voting for a Republican candidate for U.S. Senate. However, there is

nothing in the rule that specifies that the voter must be allowed to vote for both parties' candidates for Governor, and therefore the rule does not conflict with Alaska's laws providing for a blanket primary.

Because the minor parties have failed to identify any AIP rules which conflict with the State's blanket primary system and do not present any other evidence of an actual case or controversy associated with that party, we conclude that the AIP's claims must be dismissed for lack of ripeness.

B. Alaska Libertarian Party

The minor parties also argue that the challenge of the ALP is ripe because it "opposes the primary election system as a concept and desires that each party have the right of self control over the nomination of its candidates." However, no allegation was made of how the ALP would otherwise nominate candidates, and there is no indication that it has adopted a procedure which would conflict with the State's blanket primary system. The minor parties argue that the ALP's action is nevertheless ripe due to the fact that the ALP was not (and is not) ballot qualified and therefore could not place candidates on the primary ballot. Therefore, according to this argument, the ALP's candidates for the general election would have to be designated by the ALP, and this would violate state law. However, Alaska statutes provide for the inclusion on both the primary and general election ballots of candidates of a political "group" (an organization which represents a political program but does not qualify as a party), and these provisions do not contain

any requirements relating to how a political group may decide which candidates it supports. *See O'Callaghan*, 914 P.2d at 1255 n. 9; Alaska Stat. §§ 15.25.140-205 (Michie 1989). Therefore, the designation of candidates by the ALP, which was not and is not ballot qualified, does not conflict with Alaska law.

Because the minor parties cannot demonstrate a "substantial controversy . . . of sufficient immediacy and reality," *Aydin Corp.*, 940 F.2d at 528, we affirm the district court's dismissal of their claims for lack of ripeness.

CONCLUSION

Based on the foregoing discussion, we AFFIRM the district court's grant of partial summary judgment against the Republican Party on the basis of issue preclusion, and the dismissal of the AIP and ALP for failure to present a ripe claim.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-35720
CT/AG#: CV-95-00053-HRH

WAYNE ANTHONY ROSS; THE REPUBLICAN PARTY OF ALASKA, INC.; THE ALASKA LIBERTARIAN PARTY; THE ALASKAN INDEPENDENCE PARTY; MARK CHRYSON; LINDA S. MCKAY

Plaintiffs – Appellants

v.

STATE OF ALASKA; STATE OF ALASKA, DIVISION OF ELECTIONS; LIEUTENANT GOVERNOR FRAN ULMER, in her official capacity of Supervisor of Elections; SANDRA J. STOUT, in her official capacity of Director of the Division of Elections; JANE/JOHN DOE, 1 through 10

Defendants – Appellees

(Filed Sept. 28, 1999)

APPEAL FROM the United States District Court for the District of Alaska (Anchorage).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.